GRANTED

Nos. 05-547, 05-7664

FILED
JUN 19 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

JOSE ANTONIO LOPEZ, *Petitioner*,

v.

ALBERTO R. GONZALES, Attorney General of the United States, *Respondent*.

REYMUNDO TOLEDO-FLORES, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH AND FIFTH CIRCUITS

BRIEF FOR AMICI CURIAE NYSDA IMMIGRANT DEFENSE PROJECT, AMERICAN CIVIL LIBERTIES UNION, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, IMMIGRANT LEGAL RESOURCE CENTER, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND NATIONAL LEGAL AID AND DEFENDER ASSOCIATION SUPPORTING PETITIONERS

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The question in this case is whether a state conviction for simple possession of a controlled substance qualifies as an "aggravated felony" within the meaning of the Immigration and Nationality Act. The courts of appeals have misconstrued and disregarded the critical statutory terms of 8 U.S.C. § 1101(a)(43)(B) and, as a result, have reached different conclusions on this question. Amici respectfully submit the instant brief to demonstrate that the statute, properly understood based on its plain language, does not encompass simple drug possession offenses. Accordingly, the judgments below in *Lopez* v. *Gonzales*, 417 F.3d 934 (8th Cir. 2005), and *United States* v. *Toledo-Flores*, 149 Fed. Appx. 241 (5th Cir. 2005), should be reversed.

INTEREST OF AMICI[1]

The NYSDA Immigrant Defense Project ("IDP") is a not-for-profit legal resource and training center dedicated to advancing the legal rights of immigrants. A national expert on the intersection of criminal and immigration law, IDP trains and advises both criminal justice and immigrant advocates on issues that involve the immigration consequences of criminal convictions. IDP seeks to improve the quality of justice for non-citizens accused of criminal conduct and therefore has a keen interest in the fair and just administration of the nation's immigration laws.

The American Civil Liberties Union ("ACLU") is a nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this Nation's civil rights laws. The Immigrants' Rights Project ("IRP") of the ACLU conducts a nationwide program of litigation and advocacy to

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[1] Pursuant to Rule 37.3(a), letters of consent to the filing of this brief are being lodged with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

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enforce and protect the constitutional and civil rights of noncitizens.

Founded in 1946, the American Immigration Lawyers Association ("AILA") is a national nonprofit association of over 9,500 attorneys and law professors who practice and teach in the field of immigration and nationality law. AILA works to promote justice, advocate for fair and reasonable immigration law and policy, and advance the quality of immigration and nationality law and practice in the United States. AILA member attorneys represent tens of thousands of immigrant families and regularly appear before federal courts throughout the United States.

The Immigrant Legal Resource Center ("ILRC") is a national clearinghouse that provides technical assistance, training, and publications to low-income immigrants and their advocates to advance immigrant rights. Among its other areas of expertise, the ILRC is a leading authority on the intersection between immigration and criminal law. The ILRC provides daily assistance to criminal and immigration defense counsel on issues relating to citizenship, immigration status, and the immigration consequences of criminal convictions.

Founded in 1958, the National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with more than 13,000 affiliate members in 50 states, including private criminal defense attorneys, public defenders, and law professors. NACDL is dedicated to promoting criminal law research, encouraging integrity, independence, and expertise among criminal defense counsel, and advancing the proper and efficient administration of justice. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The National Legal Aid and Defender Association ("NLADA") is a nonprofit corporation dedicated to supporting indigent defender services and providing civil legal assistance. NLADA has approximately 680 program members, representing 12,000 lawyers, as well as approximately 1,000

individual members. NLADA is a leading voice in public policy debates on equal justice issues, and it is the oldest and largest national nonprofit membership association that devotes its resources exclusively to serving the equal justice community.

BACKGROUND

Statutory Framework

Title 8 U.S.C. § 1101(a)(43)(B) defines when a noncitizen may be deemed an aggravated felon. The provision provides in relevant part that the term "aggravated felony" means:

> illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18). . . . The term applies to an offense described in this paragraph whether in violation of Federal or State law . . . .

In other words, those who are convicted of "illicit trafficking" "including" a "drug trafficking crime" are subject to treatment as aggravated felons.

In properly interpreting this provision, three terms must be understood and given effect: "illicit trafficking," "including," and "drug trafficking crime." The first relevant term, "illicit trafficking," is not statutorily defined. The second relevant term, "including," is also not defined. The final relevant term, "drug trafficking crime," is defined by cross reference to 18 U.S.C. § 924(c)(2), which in turn provides: "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)."

Virtually all of the courts that have considered the statute's scope have focused on the last term of the statute, namely, whether a particular crime purportedly qualifies as "a drug trafficking crime (as defined in section 924(c) of Title

18)."[2] These courts have essentially disregarded the rest of the statutory terms and have instead "'navigate[d] a rather confusing maze of statutory cross-references,'" *United States* v. *Palacios-Suarez*, 418 F.3d 692, 695 (6th Cir. 2005) (quoting *United States* v. *Robles-Rodriguez*, 281 F.3d 900, 903 (9th Cir. 2002)), tracing 8 U.S.C. § 1101(a)(43)(B) to 18 U.S.C. § 924(c)'s definition of "drug trafficking crime"; then to the Controlled Substances Act (21 U.S.C. § 801 et seq.); and often then to the "felony" definition of 21 U.S.C. § 802(13).

By following this path, the courts of appeals have encountered startling ambiguity, have adopted inconsistent interpretations of the same statutory language, and, in many circuits, have reached the somewhat jarring conclusion that a *state-law simple possession* offense can be a *"drug trafficking crime,"* and, therefore, an aggravated felony. *See, e.g., United States* v. *Sanchez-Villalobos*, 412 F.3d 572 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 1142 (2006) (concluding that a state-law misdemeanor conviction for possession of codeine, which resulted in sentence of sixty days, was a "drug trafficking crime" and therefore an aggravated felony).

The Petitioners

Petitioners Lopez and Toledo-Flores were convicted of possessing controlled substances in violation of state law. Specifically, Petitioner Lopez was convicted under the law of South Dakota for aiding and abetting the possession of a

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[2] *See, e.g., Lopez*, 417 F.3d at 937; *Toledo-Flores*, 149 Fed. Appx. at 242; *see also United States* v. *Restrepo-Aguilar*, 74 F.3d 361, 364-366 (1st Cir. 1996); *United States* v. *Pornes-Garcia*, 171 F.3d 142, 145-146 (2d Cir. 1999); *United States* v. *Wilson*, 316 F.3d 506, 512-513 (4th Cir. 2003); *United States* v. *Hinojosa-Lopez*, 130 F.3d 691, 693-694 (5th Cir. 1997); *United States* v. *Palacios-Suarez*, 418 F.3d 692, 695-700 (6th Cir. 2005); *Gonzales-Gomez* v. *Achim*, 441 F.3d 532, 533-534 (7th Cir. 2006); *United States* v. *Briones-Mata*, 116 F.3d 308, 309 (8th Cir. 1997); *United States* v. *Ibarra-Galindo*, 206 F.3d 1337, 1339-1341 (9th Cir. 2000); *United States* v. *Cabrera-Sosa*, 81 F.3d 998, 1000 (10th Cir. 1996); *United States* v. *Simon*, 168 F.3d 1271, 1272 (11th Cir. 1999).

controlled substance (cocaine), and Petitioner Toledo-Flores was convicted under the law of Texas for simple possession of a mere 0.16 grams of cocaine. Although neither conviction included any element of trafficking or distribution, the courts below determined that each of these state-law possession offenses was a "drug trafficking crime" and, therefore, an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(B).

The determination that a non-citizen is an aggravated felon has serious consequences in both the criminal and immigration contexts. In the criminal sentencing context, the determination that a non-citizen is an aggravated felon increases the statutory maximum sentence for illegal reentry from two years to twenty years. 8 U.S.C. § 1326(a) & (b)(2); USSG § 2L1.2(b)(1)(C); *see also Almendarez-Torres* v. *United States*, 523 U.S. 224, 226 (1998). And, in the immigration context, while non-citizens are rendered deportable for virtually all possession crimes involving controlled substances, 8 U.S.C. § 1227(a)(2)(B), serious additional consequences flow if a non-citizen is denominated an aggravated felon. *See, e.g.*, 8 U.S.C. § 1229b(a) (forbidding the Attorney General from granting cancellation of removal if the applicant has been convicted of an aggravated felony); 8 U.S.C. § 1158(b)(2)(B)(i) (barring asylum for aggravated felons, even with a well-founded fear of persecution in their countries of removal); 8 U.S.C. § 1182(a)(9)(A)(i) (barring an aggravated felon from reentering the United States); 8 U.S.C. §§ 1101(f)(8) & 1427(a)(3) (permanently barring aggravated felons from obtaining United States citizenship).

SUMMARY OF ARGUMENT

Title 8 U.S.C. § 1101(a)(43)(B)—which renders "illicit trafficking in a controlled substance . . . including a drug trafficking crime" an aggravated felony—does not encompass state-law simple possession offenses. In construing § 1101(a)(43)(B), three separate terms must be understood and given effect: "illicit trafficking," "including," and "drug trafficking crime."

The question in this case is whether a state conviction for simple possession of a controlled substance qualifies as an "aggravated felony" within the meaning of the Immigration and Nationality Act. The courts of appeals have misconstrued and disregarded the critical statutory terms of 8 U.S.C. § 1101(a)(43)(B) and, as a result, have reached different conclusions on this question. Amici respectfully submit the instant brief to demonstrate that the statute, properly understood based on its plain language, does not encompass simple drug possession offenses. Accordingly, the judgments below in *Lopez* v. *Gonzales*, 417 F.3d 934 (8th Cir. 2005), and *United States* v. *Toledo-Flores*, 149 Fed. Appx. 241 (5th Cir. 2005), should be reversed.

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First, Congress's use of the word "including" demonstrates that the initial term, "illicit trafficking," sets forth the *broader* category, and that the later term, "drug trafficking," is a *subset* of this broader term. Based on the text's plain meaning and the presumption against rendering statutory provisions superfluous, "illicit trafficking" defines the outer bounds of conduct that is swept within § 1101(a)(43)(B), and "drug trafficking" is a component of that larger preceding class. *See infra* Part I.

Second, the plain meaning of the broader term, "illicit trafficking," is clear: According to dictionary definitions, decades of consistent case law, and Congress's own use and definition of the term, "illicit trafficking" only covers actions connected to commercial activity (the trade, exchange, distribution for remuneration, or sale of drugs). Importantly, the plain meaning of "illicit trafficking" in a controlled substance does *not* include simple possession. *See infra* Part II.

Finally, the third term, "drug trafficking crime," is a component of the broader term "illicit trafficking." While the more expansive term, "illicit trafficking," explicitly covers both state and federal trafficking offenses, "a drug trafficking crime" only encompasses *federal* trafficking offenses. In other words, "illicit trafficking" describes the broader category of state and federal trafficking offenses; a "drug trafficking crime" (as defined in 18 U.S.C. § 924(c)(2)), describes the *federal subset* of trafficking offenses included in that broader category. *See infra* Part III.

ARGUMENT

I. "DRUG TRAFFICKING CRIME" IS A SUBSET OF "ILLICIT TRAFFICKING"

Title 8 U.S.C. § 1101(a)(43)(B) renders an immigrant an aggravated felon if he has been convicted of "illicit trafficking in a controlled substance . . . *including* a drug trafficking crime (as defined in section 924(c) of Title 18)" (emphasis added). Because the clause "drug trafficking crime" *follows* the word "including," "illicit trafficking" defines a general

class of offenses, and "drug trafficking crime" is a subset of that larger preceding group.

These two terms fit together in a natural way: The broader term "illicit trafficking" encompasses both *state and federal trafficking offenses*, and "drug trafficking crime," the narrower term in § 1101(a)(43)(B), only refers to the *federal* subset of this class. State-law possession offenses are therefore excluded from § 1101(a)(43)(B).

A. Enumerated Items Or Definitions That Follow The Word "Including" Are Part Of A Larger Preceding Group

The word "including" has a firmly established meaning. Black's Law Dictionary 777 (8th ed. 2004) defines the word "include" to mean: "To contain as a part of something." Webster's New International Dictionary 1258 (2d ed. 1959) defines "include" as: "To comprehend or comprise, as a genus the species, the whole a part . . . to contain; embrace." The American Heritage College Dictionary 687 (3d ed. 2000) defines "include" to mean: "(1) To take in as a part, an element, or a member. (2) To contain as a secondary or subordinate element. [or] (3) To consider with or place into a group, class, or total." Likewise, the Oxford English Dictionary 801 (2d ed. 1989) states that the word "including" "particulariz[es] a person or thing included in a group previously (or afterwards) mentioned; = Inclusive of."

This Court has frequently observed that the word "including" indicates that that which follows is a subset of the larger preceding class. *See S.D. Warren Co.* v. *Maine Bd. of Envt'l Protection*, 126 S. Ct. 1843, 1847 (2006) (observing that the term "discharge," which preceded the word "including," must be "broader" than the terms following the word "including"); *Federal Land Bank of St. Paul* v. *Bismark Lumber Co.*, 314 U.S. 95, 100 (1941) ("the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle"); *Helvering* v. *Morgan's Inc.*, 293 U.S. 121, 125 n.1 (1934) ("[T]he verb 'includes' imports a general class, some of whose particular instances are those specified in the definition."); *see also*

Chickasaw Nation v. *United States*, 534 U.S. 84, 85 (2001) ("To 'include' is to 'contain' or 'comprise as part of a whole.' ") (quotation omitted).

Young v. *United States*, 315 U.S. 257 (1942), illustrates this principle. In *Young*, the Harrison Anti-Narcotic Act required "any manufacturer, producer, compounder, or vendor (including dispensing physicians)" who administered narcotics to keep adequate records. *Id.* at 258. Petitioner, a practicing physician, kept no records and was therefore convicted of dispensing narcotics in violation of the statute. This Court reversed petitioner's conviction. The Court stated that, in order to come within the Act's ambit, "the physician must be one who manufacturers, produces, compounds, or vends, or possibly only one who vends." *Id.* at 259. Even though the clause "dispensing physicians," if read in isolation, might cover petitioner, the word "including" demonstrated that "dispensing physicians" was a subset of the preceding terms; and because petitioner did not fall within any of the preceding categories (*i.e.*, he was not a manufacturer, vendor, or the like), he could not be "a 'dispensing physician' within the meaning" of the Act. *See id.* at 261.

In sum, under the plain meaning of the term "including," as well as under this Court's precedent, the term "illicit trafficking" defines a general class of offenses. A "drug trafficking crime" describes a particular and more narrow class of offenses contained within the broader "illicit trafficking" category.

B. The Government's Interpretation Fails To Give Meaning To Either The Term "Illicit Trafficking" Or "Including"

In its effort to interpret 8 U.S.C. § 1101(a)(43)(B) to encompass simple possession offenses, the Government ignores the word "including" and, in effect, renders the term "illicit trafficking" a nullity.

Under the Government's reading, a "drug trafficking crime" not only encompasses state and federal crimes that

have a trafficking component—it also covers a broad range of state-law simple possession offenses. The Government's sweeping definition essentially deprives the term "illicit trafficking" of any meaning and, therefore, is inconsistent with an "elementary canon of construction," the rule against superfluities. *Hibbs* v. *Winn*, 542 U.S. 88, 101 (2004); *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001); *Colautti* v. *Franklin*, 439 U.S. 379, 392 (1979); *see, e.g.*, *S.D. Warren Co.*, 126 S. Ct. at 1847; *see also infra* Section III.B.2 (detailing Congress's addition of the term "illicit trafficking").[3]

The Government may contend that "illicit trafficking" and a "drug trafficking crime" should be understood to be synonymous. As an initial matter, such a reading would again render the term "illicit trafficking" a nullity. *See Colautti*, 439 U.S. at 392. In addition, such a reading would violate the plain language of the statute. Title 8 U.S.C. § 1101 uses both the words "means" and "includes" or "including";[4]

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[3] In addition, the Government's expansive definition of the term "drug trafficking crime" makes the "controlled substance" category for deportability of aliens virtually meaningless. Title 8 U.S.C. § 1227(a)(2)(A)(iii) renders non-citizens denominated aggravated felons deportable, while § 1227(a)(2)(B) renders a non-citizen "convicted of a violation of (or a conspiracy or attempt to violate) any law . . . relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana" deportable. Under the Government's reading of § 1101(a)(43)(B), virtually *every* controlled substance offense constitutes an aggravated felony. As such, virtually all controlled substances offenders are rendered deportable pursuant to § 1227(a)(2)(A)(iii) rather than the more natural § 1227(a)(2)(B), with the result that § 1227(a)(2)(B) is largely divested of independent effect. Likewise, the Government's interpretation leads to the nonsensical result that a person convicted under state law of possessing 30 grams or less of marijuana could be considered an aggravated felon pursuant to § 1101(a)(43)(B) if state law deems the offense a felony but not a controlled substances offender pursuant to § 1227(a)(2)(B), although the former denomination entails far harsher consequences than the latter.

[4] Section 1101 uses the word "mean" or "means" at least 46 times. *See, e.g.*, § 1101(a)(1), (a)(3), (a)(5), (a)(6), (a)(7), (a)(8), (a)(9), (a)(10), (a)(11), (a)(13)(A), (a)(15), (a)(16), (a)(18), (a)(19), (a)(20), (a)(21), (a)(22), (a)(23), (a)(26), (a)(27), (a)(29), (a)(30), (a)(31), (a)(33), (a)(34), (a)(37), (a)(38), (a)(39), (a)(40), (a)(41), (a)(42), (a)(43), (a)(44)(A), (a)(44)(B), (a)(45), (a)(46),

the specific subpart at issue, § 1101(a)(43)(B), however, employs only the word "including." Because Congress used both the words "means" and "including" throughout the statute, it is clear that these verbs are used intentionally and purposefully. *See Bates* v. *United States*, 522 U.S. 23, 29-30 (1997). Congress therefore foreclosed any reading of "illicit trafficking" and "drug trafficking crime" that equates the two terms. *See S.D. Warren Co.*, 126 S. Ct. at 1849; *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 189 (1941); *see also United States* v. *New York Tel. Co.*, 434 U.S. 159, 169 n.15 (1977); *Helvering*, 293 U.S. at 126 n.1.

Alternatively, the Government may attempt to defend the Board of Immigration Appeals' established interpretation of § 1101(a)(43)(B), which essentially substitutes the word "or" for the word "including." The Board of Immigration Appeals ("BIA") has properly held that, in order to constitute "illicit trafficking," an immigrant's controlled substance offense must contain a commonsense trafficking element and that a simple possession offense is not within this definition. *See, e.g., Matter of Davis*, 20 I. & N. Dec. 536, 540-541 (BIA 1992). In so holding, however, the BIA has erroneously severed § 1101(a)(43)(B) in two, holding that a person can be rendered an aggravated felon if he has been convicted of *either* "illicit trafficking" (which requires a nexus to trafficking) *or* a "drug trafficking crime" (as defined in § 924(c)). *Id.* at 543-544. The BIA has therefore effectively (and improperly) substituted the word "or" for the word "including."

In short, Congress did not use the word "means," "or," or any other connecting word or phrase; it instead chose the word "including." As a result, based on the plain language of

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(a)(47)(A), (a)(48)(A), (a)(49), (a)(50), (b)(1), (b)(2), (b)(3), (b)(4), (c)(1), (h). The word "including" or "includes" is used at least 17 times. *See, e.g.*, § 1101(a)(13)(C)(iv), (a)(14), (a)(15)(E) & (H) & (O)(ii)(III) & (U)(i)(IV) & (U)(ii)(V), (a)(17), (a)(28), (a)(36), (a)(43)(B) & (G), (b)(4), (b)(5), (c)(1), (c)(2), (f)(8). (This tally does not include the several times that the statute refers to that which is included "but is not limited to.")

the statute, "illicit trafficking" is the broader term and defines the outer bound of the statutory definition, and "drug trafficking crime" is a narrower subset of this broader category.

II. "ILLICIT TRAFFICKING" MEANS COMMERCIAL ACTIVITY INVOLVING THE TRADE, EXCHANGE, DISTRIBUTION FOR REMUNERATION, OR SALE OF GOODS, AND DOES NOT INCLUDE SIMPLE POSSESSION OFFENSES

"Illicit trafficking" is the broader term, fully encompassing the subset of "drug trafficking crime[s]." Because "illicit trafficking" is not defined, the term must be afforded its "ordinary or natural meaning." *FDIC* v. *Meyer*, 510 U.S. 471, 476 (1994); *see Asgrow Seed Co.* v. *Winterboer*, 513 U.S. 179, 187 (1995); *Smith* v. *United States*, 508 U.S. 223, 228 (1993); *Pioneer Inv. Servs. Co.* v. *Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 388 (1993); *Perrin* v. *United States*, 444 U.S. 37, 42 (1979).[5]

In this case, the plain meaning of the term "illicit trafficking" is clear. As evidenced by: (1) dictionary definitions; (2) over a century of consistent case law; (3) interpretations of "illicit trafficking" in the related aggravated felony *firearms* context; (4) Congress's use and definition of the term

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[5] The fact that the undefined term, "illicit trafficking," is coupled with a defined term, "drug trafficking crime," in no way relaxes the requirement that "illicit trafficking" be construed pursuant to its plain meaning. Indeed, if anything, Congress's decision to define "drug trafficking crime" but not "illicit trafficking" heightens the command that "illicit trafficking" be construed in its ordinary and natural sense. The recent case of *S.D. Warren Co.* is illustrative. That case also involved a statutory provision containing an undefined term, the word "includ[ing]," and statutorily defined terms. 126 S. Ct. at 1847. And, as in this case, the undefined term and the defined terms contained the same word (there, the word "discharge"). The Court observed that "[t]he dispute turn[ed] on the meaning" of the undefined term, and in ascertaining the meaning of that term, the Court looked to the word's plain meaning: "since it is neither defined in the statute nor a term of art, we are left to construe it 'in accordance with its ordinary or natural meaning.'" *Id.* (quoting *Meyer*, 510 U.S. at 476).

"traffic" or "trafficking" in other statutes; and (5) the BIA's long-held interpretation of the clause "illicit traffic" to exclude those who merely possess illegal drugs—it is clear that "illicit trafficking" for purposes of § 1101(a)(43)(B) must involve commercial activity involving the trade, exchange, distribution for remuneration, or sale of a controlled substance. Quite simply, the plain meaning of "illicit trafficking" does not include possession offenses, such as those at issue here.[6]

A. Dictionary Definitions And Consistent Case Law Demonstrate That "Trafficking" Requires Commercial Activity

As commonly defined, "trafficking" necessarily involves commercial activity: the trade, exchange, distribution for remuneration, or sale of goods. Black's Law Dictionary 1534, for instance, defines "traffic" as "[c]ommerce; trade; the sale or exchange of such things as merchandise, bills, and money" or "[t]he passing or exchange of goods or commodities from one person to another for an equivalent in goods or money." Webster's New International Dictionary 2685 defines "traffic" as "to engage in commerce; to barter, buy or sell goods" or alternatively, "[t]o engage in illicit sale or purchase; to trade in something not properly for sale." Likewise, the American Heritage College Dictionary 1434 defines "traffic" as "[t]he commercial exchange of goods; trade." Mere possession does not and cannot constitute "trafficking" as the term is commonly defined and understood.

In keeping with these dictionary definitions, courts have, not surprisingly, long interpreted "trafficking" to require commercial activity. *See Urena-Ramirez* v. *Ashcroft*, 341 F.3d 51, 57 (1st Cir. 2003) ("Courts define 'illicit trafficking' as illegally 'trading, selling or dealing' in specified goods.") (citation omitted); *State* v. *Ezell*, 468 S.E.2d 679, 681

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[6] Indeed, no court of appeals has held, and the Government has not specifically argued, that simple possession offenses fall within the plain and ordinary meaning of "illicit trafficking."

(S.C. Ct. App. 1996) ("Trafficking imputes the carrying on or the engaging in a business. The word 'traffic' has a popular meaning of an exchange or passing of goods or commodities for other goods or money."); *People* v. *Horan*, 127 N.E. 673, 674-675 (Ill. 1920) ("The meaning of traffic in property . . . relates to commercial exchange of goods, wares, or any kind of merchandise, whether by barter or the use of money, bills of exchange, or other like means."); *People* v. *Dunford*, 100 N.E. 433, 434 (N.Y. 1912) ("The word 'traffic' has the popular meaning of an exchange, or a passing, of goods, or commodities, for an equivalent in goods, or money."); *Senior* v. *Ratterman*, 11 N.E. 321, 324 (Ohio 1887) ("The word 'traffic' has always had a well-understood meaning in the popular sense. It is the passing of goods or commodities from one person to another for an equivalent in goods or money, and a trafficker is one who traffics—a trader; a merchant."); *see also Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 739 (1989) (where an undefined term has "accumulated [a] settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms") (quotation omitted); *Standard Oil Co. of N.J.* v. *United States*, 221 U.S. 1, 59 (1911). Mere possession does not constitute "illicit trafficking."

Indeed, when the BIA construed the term "illicit trafficking" in *Matter of Davis*, the BIA held that "illicit trafficking" requires commercial activity. Relying on Black's Law Dictionary, the BIA explained that, "[e]ssential to the term . . . is its business or merchant nature, the trading or dealing of goods." 20 I. & N. Dec. at 541. Consequently, the BIA held, "[t]he offense of simple possession would appear to be one example of a drug-related offense not amounting to the common definition of 'illicit trafficking.'" *Id.*

B. "Illicit Trafficking In Firearms" For Purposes Of § 1101(a)(43)(C) Requires A Trafficking Element

Another subpart of 8 U.S.C. § 1101 further establishes that the phrase "illicit trafficking" for purposes of § 1101(a)(43)(B) requires commonsense trafficking. The

term "illicit trafficking" appears not only in § 1101(a)(43)(B), but also in the very next provision, § 1101(a)(43)(C). Subsection (C) renders anyone who has engaged in "*illicit trafficking* in firearms or destructive devices . . . or in explosive materials" an aggravated felon (emphasis added). Because "[a] term appearing in several places in a statutory text is generally read the same way each time it appears," *Ratzlaf* v. *United States*, 510 U.S. 135, 143 (1994), the clause "illicit trafficking" should be interpreted in the same way in the neighboring controlled substance and firearm contexts.

Not surprisingly, both the BIA and the courts of appeals have routinely demanded a showing of trafficking in the firearms context of subpart (a)(43)(C). In *Kuhali* v. *Reno*, 266 F.3d 93, 98 (2d Cir. 2001), for instance, the petitioner pled guilty to conspiracy to export firearms and ammunition without a license. Before the BIA, the petitioner argued that his export offense did not involve "trafficking." The BIA rejected the argument stating that the "essential sense of the term [trafficking] was its business or merchant nature, *i.e.*, trading, selling or dealing in goods" and that exporting firearms without a license satisfied this standard. *Id.* at 107.

The Second Circuit affirmed, observing that the "Board's specific reading of the term trafficking comports well with the legal and everyday usages of that term" and that the unlicensed export of firearms exhibits a business or merchant nature such that it constitutes commercial "dealing" in firearms. 266 F.3d at 108-109 (citing Webster's New Collegiate Dictionary 1229 (1981)); *see also United States* v. *Lindquist*, 421 F.3d 752, 755 (8th Cir. 2005) (concluding that, for purposes of USSG § 2K2.1, "an offense falls within the ambit of 'firearms trafficking' when it involves illegal commercial activity involving firearms").

Under the Government's reading of § 1101(a)(43)(B), the term "trafficking" necessarily encompasses simple "possession." Yet, the same reading of the term in § 1101(a)(43)(C) would transform simple firearm possession into "trafficking" in firearms, a position that the Government itself has not

embraced. *See* United States Br., *Kuhali* v. *Reno*, No. 00-2531, *available at* 2001 WL 34120929, at *23 ("It is the movement of the firearms in international commerce that makes the offense a trafficking offense within the meaning of Section 101(a)(43)(C) of the INA."); *see also Hoong* v. *INS*, No. 95-70197, 1996 WL 297621, at *1 n.1 (9th Cir. June 3, 1996) (observing that, for purposes of 8 U.S.C. § 1101(a)(43)(C), "the mere possession of a weapon does not amount to 'illicit trafficking in firearms'").

C. Other Statutes Confirm That The Term "Illicit Trafficking" Requires A Commercial Element

Other provisions of the U.S. Code confirm that the term "trafficking" requires a commercial element. The terms "traffic" and "trafficking" appear frequently in the U.S. Code. When they appear, as one would expect, Congress consistently defines the terms to refer to commonsense trafficking rather than mere possession.[7]

1. Title 21 U.S.C. § 862—Enacted When The Term "Aggravated Felony" Was Coined And When § 924(c)(2) Was Amended—Distinguishes Between "Trafficking" And "Possession"

When Congress defined the term "aggravated felony," it clearly understood the difference between simple possession and trafficking offenses. Title 21 U.S.C. § 862, which denies federal benefits to controlled substance offenders, is particularly instructive, as Congress enacted it contempora-

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[7] *See* 2B N. Singer, *Sutherland on Statutory Construction* § 53.03, at 329 (6th ed. 2000) (recognizing that "by transposing the clear intent expressed in one or several statutes to a statute of doubtful meaning, the court . . . is able to give effect to the probable intent of the legislature"); *see also, e.g., Reno* v. *Koray*, 515 U.S. 50, 58 (1995) (using other statutes' construction of the clause "official detention" to aid interpretation of the clause in 18 U.S.C. § 3585(b) and noting that the same term "should bear the same meaning" in "related" statutes); *Overstreet* v. *North Shore Corp.*, 318 U.S. 125, 131-132 (1943) (using the Federal Employers' Liability Act to aid the interpretation of Fair Labor Standards Act of 1938).

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neously with the definition of "aggravated felony." Section 862 expressly distinguishes between those convicted of *possessing* controlled substances and those convicted of *trafficking*. Section 862(a)(1), under the heading "Drug traffickers," states that "[a]ny individual who is convicted of any Federal or State offense consisting of the distribution of controlled substances shall" be ineligible for federal benefits for up to five years after conviction.[8] Subpart (a)(1) therefore equates "traffickers" with those guilty of "distribution." Meanwhile, subpart (b)(1), under the heading "Drug possessors," states that "[a]ny individual who is convicted of any Federal or State offense involving the possession of a controlled substance" shall be ineligible for federal benefits for up to one year following conviction.

Importantly, Congress enacted 21 U.S.C. § 862 as part of the Anti-Drug Abuse Act ("ADAA") of 1988, Pub. L. No. 100-690, § 5301, 102 Stat. 4181, 4310.[9] This is *the very same Act* that introduced the term "aggravated felony" into the immigration law lexicon, made drug "traffick[ers]" aggravated felons, and amended 18 U.S.C. § 924(c)(2)'s definition of a "drug trafficking crime." *See Leocal* v. *Ashcroft*, 543 U.S. 1, 4 n.1 (2004) (discussing the ADAA).

In summary, at the very same time and via the very same Act by which Congress made those who engaged in "drug trafficking" aggravated felons, Congress also: (1) expressly distinguished between possessors and traffickers, subjecting the latter to far harsher penalties; and (2) defined "traffick[ing]" by reference to "distribution." Thus—in light of the "basic canon of statutory construction that identical terms within an Act bear the same meaning," *Estate of*

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[8] *See Almendarez-Torres* v. *United States*, 523 U.S. 224, 234 (1998) (while not controlling, a statute's title and heading are often informative); *see also, e.g., Porter* v. *Nussle*, 543 U.S. 516, 527-528 (2002) (relying on a provision's caption to determine its meaning).

[9] Title 21 U.S.C. § 862 was later amended in 1990, although it was not materially changed. *See* Pub. L. No. 101-647, § 1002(d), 104 Stat. 4827 (1990).

Cowart v. *Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992)—just as Congress excluded possession from the meaning of trafficking in § 862, Congress similarly excluded possession offenses from the definition of trafficking in the aggravated felony definition. *See Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932); *see also, e.g.*, *Sullivan* v. *Stroop*, 496 U.S. 478, 484 (1990); *Sorenson* v. *Secretary of the Treasury*, 475 U.S. 851, 860 (1986).

2. Congress Repeatedly Uses "Trafficking" In Its Commonsense Way

In other portions of the U.S. Code as well, Congress repeatedly uses "trafficking" consistent with its plain meaning, *i.e.*, as requiring a connection to commercial activity, and Congress consistently distinguishes "trafficking" from "possession."

Title 18 U.S.C. § 1028(a)(8), for instance, makes it a crime to "knowingly traffic[] in false or actual authentication features for use in false identification documents, document-making implements, or means of identification." Subsection (d)(12) defines "traffic," for purposes of the statute, as "(A) to transport, transfer, or otherwise dispose of, to another, as consideration for anything of value; or (B) to make or obtain control of with intent to so transport, transfer, or otherwise dispose of." It is a separate crime to "possess" a fraudulent identification card with a nefarious intent.

Similarly, 18 U.S.C. § 2320(a), which outlaws trafficking in counterfeit goods or services, provides: "Whoever intentionally traffics or attempts to traffic in goods or services and knowingly uses a counterfeit mark on or in connection with such goods or services . . . shall . . . be fined . . . or imprisoned[.]" Subsection (e)(2) states: "the term 'traffic' means to transport, transfer, or otherwise dispose of, to another, for purposes of commercial advantage or private financial gain, or to make, import, export, obtain control of, or possess, with intent to so transport, transfer, or otherwise dispose of." And 17 U.S.C. § 1101, which outlaws the unauthorized fixation and trafficking in sound recordings and mu-

sic videos, borrows this same definition of "traffic" from § 2320(e)(2). *See* 17 U.S.C. § 1101(b).

Indeed, when Congress defines the word "commerce" throughout the U.S. Code, it does so by reference to a few synonyms such as "trade" and "traffic." *See, e.g.*, 29 U.S.C. § 152(6); 29 U.S.C. § 652(3); 29 U.S.C. § 1002(11); 30 U.S.C. § 802(b).

In short, when the term "trafficking" appears in the U.S. Code, Congress defines the term in a manner consistent with its plain meaning and distinguishes the term from mere possession.

D. By The Time Congress Amended 8 U.S.C. § 1101 To Include The Term "Illicit Trafficking," The BIA Had Long Held That Possession Does Not Constitute "Illicit Trafficking"

Finally, in enacting legislation, Congress is presumed to be aware of longstanding administrative interpretations of particular statutory language. *See Commissioner of Internal Revenue* v. *Keystone Consol. Indus., Inc.*, 508 U.S. 152, 159 (1993); *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978). By the time Congress deemed those who engage in "illicit trafficking" aggravated felons, the term "illicit trafficking" had a settled administrative meaning, dating back half a century. As a result, when Congress amended the aggravated felony provision in 1990 to include the term "illicit trafficking," Congress incorporated the phrase's well-established interpretation. *Keystone Consol. Indus.*, 508 U.S. at 159 (concluding that because "[t]he phrase 'sale or exchange' had acquired a settled judicial and administrative interpretation," when Congress used the phrase, Congress incorporated the phrase's already settled meaning).

The Immigration and Nationality Act of 1952 made a non-citizen inadmissible to the United States if he or she, *inter alia*, had "been convicted of a violation of any law or regulation relating to the *illicit traffic* in narcotic drugs." 8 U.S.C. § 1182(a)(23) (1952) (emphasis added). The very year after this provision was enacted, the meaning of the clause

"illicit traffic" was challenged. The Government urged the BIA to conclude that a non-citizen who had been convicted of possession of narcotics under California law had engaged in "illicit trafficking" for purposes of the 1952 Act. *In the Matter of L----*, 5 I. & N. Dec. 169, 171 (BIA 1953). The BIA summarily rejected the Government's interpretation, concluding:

> The alien in the instant case was convicted merely of possession. . . . Traffic has been defined as commerce; trade; sale or exchange of merchandise, bills, money, and the like; the passing of goods or commodities from one person to another or an equivalent in goods or money; and a trafficker is one who trafficks or a trader, a merchant. . . . [A] conviction solely for possession, without more, . . . does not constitute a conviction of illicit traffic in narcotic drugs[.]

Id. at 171-172;[10] *see also In the Matter of B----*, 5 I. & N. Dec. 479, 480-481 (BIA 1953).

This definition of "illicit trafficking" was long-settled by the time Congress again enacted immigration legislation at 8 U.S.C. § 1101(a)(43)(B), using the precise term "illicit trafficking." In so doing, Congress could not have intended to reach those who merely possess illicit drugs.[11]

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[10] In 1956, Congress added language to § 241(a)(11) of the Immigration and Nationality Act to make a conviction for "illicit possession" of narcotics a ground for deportation. *See* Narcotic Control Act of 1956, Pub. L. No. 84-728, § 301(a), 70 Stat. 567, 575. The amended language required the deportation of an alien convicted of a law "relating to the illicit possession of or traffic in narcotic drugs or marihuana." 8 U.S.C. § 1182(a)(23) (1956). Thus, Congress clearly understood "possession of" and "traffic in" drugs to be two distinct acts.

[11] Of course, if there is proof that a person possesses controlled substances *with an intent to sell them*, his or her conduct falls within the plain meaning of "trafficking." *See, e.g., Gonzales-Gomes* v. *Achim*, 441 F.3d 532, 534 (7th Cir. 2006); *see also Virginia* v. *Black*, 538 U.S. 343, 398 (2003) (Thomas, J., dissenting) (equating "possession with intent to distribute" with "trafficking"). Notwithstanding this caveat, there can be little doubt

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In short, under its plain meaning—as reflected by dictionary definitions, decades of consistent case law, a companion firearm provision, other statutes, and the legislative backdrop dating back half a century—"trafficking" requires commercial activity and does not include simple possession. *See Matter of Davis*, 20 I. & N. Dec. at 541 ("The offense of simple possession would appear to be one example of a drug-related offense not amounting to the common definition of 'illicit trafficking.'"); *see also Steele* v. *Blackman*, 236 F.3d 130, 136 n.5 (3d Cir. 2001) (equating "illicit trafficking" with "the marketing of drugs"); *Gonzales-Gomez* v. *Achim*, 372 F. Supp. 2d 1062, 1065 (N.D. Ill. 2005), *aff'd*, 441 F.3d 532 (7th Cir. 2006) ("It is undisputed that a simple drug possession does not constitute 'illicit trafficking in a controlled substance'[.]"). Petitioners' drug possession offenses do not constitute "illicit trafficking" within the meaning of § 1101(a)(43)(B).

III. A "DRUG TRAFFICKING CRIME" AS DEFINED BY 18 U.S.C. § 924(c)(2) REFERS TO ONLY *FEDERAL* TRAFFICKING OFFENSES

The final relevant term in the aggravated felony definition—"drug trafficking crime"—is a subset of the broader term "illicit trafficking." The broader term, "illicit trafficking," applies to all *federal and state* trafficking offenses. *See* 8 U.S.C. § 1101(a)(43) ("The term applies to an offense described in this paragraph whether in violation of Federal or State law[.]"); *Matter of Davis*, 20 I. & N. Dec. at 541 (concluding that "illicit trafficking" constitutes any state or federal felony conviction "involving the unlawful trading or dealing of any controlled substance"). The narrower term "drug trafficking crime" (as defined by 18 U.S.C. § 924(c)(2)) refers only to *federal* trafficking crimes. In other words, the

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that "possession" and "trafficking" are distinct categories—as demonstrated by the plain meaning of these words, as well as Congress's and the BIA's consistent use of these terms.

term "drug trafficking crime" defines the *subset of federal trafficking crimes* within the broader "illicit trafficking" category.

A. Section 924(c)(2)'s Plain Language And Broader Statutory Context Make Clear That The Term "Drug Trafficking Crime" Refers To Only Federal Offenses

Section 924(c)(2) defines "drug trafficking crime" for purposes of § 1101(a)(43)(B). It provides:

> For purposes of this subsection, the term "drug trafficking crime" means any *felony punishable under* the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

18 U.S.C. § 924(c)(2) (emphasis added).

By its plain terms, § 924(c)(2) reaches only federal felonies "punishable under," *inter alia*, the Controlled Substances Act. The federal Controlled Substances Act, by its terms, does not "punish" state-law-defined felonies, and, therefore, the plain language indicates that state-law crimes are not included. *See, e.g., Gonzales-Gomes*, 441 F.3d at 534. Indeed, other provisions of the statute—specifically, 18 U.S.C. § 924(g) and (k)—make it crystal clear that Congress did not intend to reach state-law violations. *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."); *see Reno* v. *Koray*, 515 U.S. 50, 56 (1995); *United States* v. *Morton*, 467 U.S. 822, 828 (1984).

Both § 924(g) and § 924(k) use the *identical key language* of § 924(c)(2), referring to conduct "punishable under the Controlled Substances Act . . . the Controlled Substances Import and Export Act . . . or the Maritime Drug Law Enforcement Act[.]" In addition, in both sections, Congress

separately refers to *state* controlled substance offenses, *i.e.*, violations of "any State law relating to any controlled substance."

Section 924(g) provides:

> Whoever, with the intent to engage in conduct which—
>
> (1) constitutes an offense listed in section 1961(1),
>
> (2) is *punishable under the Controlled Substances Act* (21 U.S.C. 802 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.),
>
> (3) *violates any State law* relating to *any controlled substance* (as defined in section 102(6) of the Controlled Substances Act, 21 U.S.C. 802(6)), or
>
> (4) constitutes a crime of violence (as defined in subsection (c)(3)),
>
> travels from any State or foreign country into any other State and acquires, transfers, or attempts to acquire or transfer, a firearm in such other State in furtherance of such purpose, shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

18 U.S.C. § 924(g) (emphasis added).

Likewise, 18 U.S.C. § 924(k) provides:

> A person who, with intent to engage in or to promote conduct that—
>
> (1) is *punishable under the Controlled Substances Act* (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.);
>
> (2) *violates any law of a State* relating to *any controlled substance* (as defined in section 102

> of the Controlled Substances Act, 21 U.S.C. 802); or
>
> (3) constitutes a crime of violence (as defined in subsection (c)(3)),
>
> smuggles or knowingly brings into the United States a firearm, or attempts to do so, shall be imprisoned not more than 10 years, fined under this title, or both.

18 U.S.C. § 924(k) (emphasis added).

Subsections 924(g) and (k) demonstrate two key points. First, Congress's separate enumeration of state-law offenses in subsections (g)(3) and (k)(2), alongside the concurrent use of the phrase "punishable under the Controlled Substances Act" in subsections (g)(2) and (k)(1), show that Congress understood drug offenses "punishable under the Controlled Substances Act" *not* to include state offenses. Thus, the phrase "punishable under the Controlled Substances Act"—whether appearing in § 924(c), (g), or (k)—refers to a crime that is or has been punished under that Act, as the plain language indicates. If it were otherwise, subsections (g)(3) and (k)(2), which refer to state-law controlled substances offenses, would be superfluous and "practically devoid of significance," *Leocal*, 543 U.S. at 12.

Second, subsections (g)(3) and (k)(2) show that, in the CSA, when Congress intended to reach a defendant who had violated a state-law drug crime, Congress made its intent explicit. *See Central Bank of Denver* v. *First Interstate Bank of Denver*, 511 U.S. 164, 176-177 (1994). Congress *intentionally* referred to state-law offenses in subsections (g) and (k) but not in (c)(2). Under a bedrock canon of statutory construction, § 924(c)(2), which speaks only of federal offenses, located in the same statute as subsections which speak of state offenses, cannot be construed to reach those who have violated only state law. *See Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the dispa-

rate inclusion or exclusion.") (quotation omitted); *see also Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 452-454 (2002); *Duncan* v. *Walker*, 533 U.S. 167, 173-174 (2001). The "distinct provision" for state-law controlled substances offenses under subsections (g)(3) and (k)(2)—coupled with its noteworthy absence in (c)(2)—compels the conclusion that neither subsection (c)(2) itself, nor its substantive language, "encompass[es]" controlled substance offenses where the conviction is obtained pursuant to state law. *See Leocal*, 543 U.S. at 12.

Significantly, these comparable provisions were not only enacted by the same Congress and not only appear in the same statute—but *one is an immediately adjacent section of the very same Act.* In 1988, in § 6212 of the ADAA, Congress amended the definition of "drug trafficking crime" to its current form in 18 U.S.C. § 924(c)(2). *See* Pub. L. No. 100-690, § 6212, 102 Stat. 4181 (1988). Meanwhile, § 6211 of the ADAA—the preceding section of the very same Act—also enacted what is now 18 U.S.C. § 924(g) (set forth above). Hence, at the very moment Congress first defined a "drug trafficking crime" to refer to crimes "punishable under the Controlled Substances Act" (and two other specific statutes), Congress enacted the neighboring provision that makes clear that such language does *not* reach state-law crimes.

B. The Statutory Evolution Of § 924(c) And The Aggravated Felony Definition Confirm That § 924(c) Refers To Only Federal Offenses

The statutory evolution of § 924(c) and the aggravated felony definition underscore what the language of 18 U.S.C. § 924 makes plain: a "drug trafficking crime" refers only to crimes prosecutable under federal law.

1. The 1988 "Clarification" To The Definition Of "Drug Trafficking Crime"

The fact that § 924(c) only applies to federal offenses is further supported by its predecessor provision. That section provided an enhancement for "any felony violation of *Fed-*

eral law involving distribution, manufacture, or importation of any controlled substance" (emphasis added). In 1988, Congress made a "clarification" to the definition of "drug trafficking crime," substituting in "any felony punishable under," *inter alia*, "the Controlled Substances Act." *See* ADAA, Pub. L. No. 100-690, § 6212, 102 Stat. 4181 (1988). In so doing, Congress did not alter the statute's scope. Congress labeled its amendment a "*clarification* of definition of drug trafficking crimes" and was delineating the types of *federal* trafficking crimes within the definition's grasp; nowhere in the statute or legislative history did Congress refer to state crimes or indicate that this "clarification" was intended to greatly expand the provision's reach. 134 Cong. Rec. S17301, at S17363 (1988) (Section Analysis of Judiciary Comm. Issues in H.R. 5210 by Sen. Biden); *see also Gonzales-Gomez*, 441 F.3d at 534; *Cazarez-Gutierrez* v. *Ashcroft*, 382 F.3d 905, 914-916 (9th Cir. 2004); *Gerbier* v. *Holmes*, 280 F.3d 297, 308-309 (3d Cir. 2002).

Indeed, as noted above, in a neighboring provision of the very same Act, Congress added what is now § 924(g), making clear that Congress intended the phrase "any felony punishable under the Controlled Substances Act" (and two other federal drug statues) to refer only to federal crimes. *See* ADAA, Pub. L. No. 100-690, § 6211, 102 Stat. 4181 (1988); *see also supra* Section III.A.[12]

2. The 1990 Expansion To The Definition Of "Aggravated Felony"

The fact that § 924(c)—pre- and post-1988—is limited to federal crimes is further demonstrated by the 1990 amendments to the definition of "aggravated felony."

In amending 8 U.S.C. § 1101(a)(43)(B) in 1990, Congress's avowed purpose was to reach those convicted of *state*

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[12] Congress also enacted 21 U.S.C. § 862 at the same time. As noted *supra* in Section II.C.1, 21 U.S.C. § 862 distinguishes between possessors and traffickers and also, unlike the amended 18 U.S.C. § 924(c)(2), explicitly reaches those convicted of state, as well as federal, offenses.

drug trafficking offenses. *See, e.g.*, H.R. Rep. No. 101-681, at 147 (1990) (noting that the amendment's purpose was to specify that a state drug trafficking conviction renders a non-citizen an aggravated felon).

The fact that Congress amended § 1101(a)(43)(B) in order to reach state trafficking crimes is revealing: If "drug trafficking crime" under § 924(c) already encompassed state-law trafficking crimes, no amendment would have been necessary. But that was not the case. Prior to 1990, an aggravated felony only included "any drug trafficking crime as defined in section 924(c)(2) of Title 18, United States Code," *i.e.*, a federal drug offense. Congress's 1990 amendment thus demonstrates that that language does not extend to state-law crimes.

The manner in which Congress amended § 1101(a)(43)(B) is likewise revealing. In seeking to reach state offenses, Congress did not amend the underlying "drug trafficking crime" definition of 18 U.S.C. § 924(c)(2). The "drug trafficking crime" definition—and the reference to it in the aggravated felony definition—remained unchanged.

Rather, mindful of § 924(c)(2)'s limitations, Congress reached state trafficking crimes in a different way. First, it added the more general and encompassing term, "illicit trafficking in a controlled substance," which is now the first (and broader) clause of § 1101(a)(43)(B).[13] Second, it added a new provision at the end of subsection (a)(43), stating: "The term [aggravated felony] applies to an offense described in this paragraph whether in violation of Federal or State law[.]" 8 U.S.C. § 1101(a)(43).[14]

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[13] As noted above, the Government's sweeping interpretation of "drug trafficking" crime essentially swallows the term "illicit trafficking." Thus, the Government's interpretation would require the Court to accept that Congress specifically amended the statute in 1990 by adding words ("illicit trafficking in a controlled substance") that have little or no meaning.

[14] *See* Immigration Act of 1990, Pub. L. No. 101-649, § 501(a), 104 Stat. 4978, 5048, as corrected by Miscellaneous and Technical Immigration

Hence, in seeking to expand the "aggravated felony" category to encompass state-law trafficking crimes, Congress added the broad term "illicit trafficking" and made clear that it applies to state and federal trafficking crimes. Significantly, it left the definition of § 924(c), which only applies to federal crimes, unchanged.[15]

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and Naturalization Amendments of 1991, Pub. L. No. 102-232, § 306(a)(1), 105 Stat. 1733, 1751.

[15] In enacting the 1990 amendment, Congress expressed its approval of the ultimate outcome of a BIA decision, *Matter of Barrett*, 20 I. & N. Dec. 171 (BIA 1990). In that case, the BIA construed § 1101(a)(43)(B) to extend to state controlled substance trafficking offenses. But while Congress approved of the ultimate *effect* of the BIA opinion, Congress clearly did not approve of the BIA's *reasoning* (*i.e.*, "that the definition of 'drug trafficking crime' . . . encompasses state convictions for crimes," *id.* at 177-178). Had Congress approved of the BIA's reasoning and agreed with the BIA that the clause "drug trafficking crime" reached state offenses, there would have been no need to add a new clause—"illicit trafficking"—into § 1101(a)(43)(B)'s statutory definition.

* * *

As demonstrated by its plain language, the statutory context, and its statutory evolution, § 924(c)(2)'s definition of a "drug trafficking crime" only covers *federal* crimes.[16] Thus, while "illicit trafficking" in a controlled substance encompasses both state and federal trafficking crimes, a "drug trafficking crime" as defined by § 924(c) only refers to the *federal subset* of trafficking offenses.

CONCLUSION

Petitioners' state-law convictions for possession of controlled substances do not constitute "illicit trafficking in a controlled substance" or a "drug trafficking crime" within the meaning of 8 U.S.C. § 1101(a)(43)(B). Accordingly, Petitioners were improperly denominated "aggravated felons." The judgments of the United States Courts of Appeals for the Eighth and Fifth Circuits should be reversed.

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[16] Indeed, § 924(c) captures all federal trafficking offenses: § 924(c)(2) defines a "drug trafficking crime" by reference to felonies, and under federal law, all federal trafficking crimes are felonies. In contrast, virtually all first-time drug possession offenses are classified not as felonies, but as misdemeanors. *See* 21 U.S.C. § 844(a).

It is true that, under the CSA, possessing a mixture or substance that contains more than five grams of cocaine base constitutes a felony, as does possession of flunitrazepam. 21 U.S.C. § 844(a). While it could be argued that Congress deemed such offenses trafficking crimes, the better argument is that such offenses are not "drug trafficking crime[s]" for purposes of § 1101(a)(43)(B). The broader clause, "illicit trafficking," limits what constitutes a "drug trafficking crime" for purposes of § 1101(a)(43)(B): A "drug trafficking crime" without any trafficking nexus falls outside § 1101(a)(43)(B)'s scope. *See Dolan* v. *United States Postal Serv.*, 126 S. Ct. 1252, 1257 (2006) (recognizing that a word's meaning may be limited by the terms that precede it); *see also, e.g., Chickasaw Nation*, 534 U.S. at 85 (refusing to give Congress's reference to "chapter 35" full effect because the reference to "chapter 35" was prefaced by the word "including" and was therefore circumscribed by the remainder of the subsection); *Young*, 315 U.S. at 259-260 (concluding that the clause "dispensing physicians," prefaced by the word "including," was limited by the preceding terms).

Respectfully submitted.

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JUNE 2006